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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN-00-067-52440

Office: Nebraska Service Center

Date: 07 JAN 2002

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

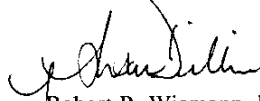
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a travel and tourism agency with five employees and a gross annual income of \$1.8 million. It seeks to employ the beneficiary as a marketing analyst for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director denied the petition because the record contains insufficient evidence to demonstrate that the proffered position requires the theoretical and practical application of highly specialized knowledge to perform the proposed duties. On appeal, counsel argues in part that the duties of the proffered position are sufficiently complex to qualify the position as a specialty occupation.

Counsel's argument on appeal is not persuasive. The Service does not rely solely on the title of a position in determining whether that position qualifies as a specialty occupation. The specific duties of the proffered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- (1) Research travel industry and market conditions to determine potential increases in services for Asian countries, especially to India;
- (2) Design, promote, price, and distribute travel and travel related services;
- (3) Generate, define and evaluate marketing options for various airlines;

- (4) Devise methods and procedures for collecting data regarding airfares, cruises, etc.;
- (5) Code, tabulate and evaluate data for the above; and
- (6) Make recommendations to management based on findings and suggest course of actions.

The duties described above appear to paraphrase the duties described in the Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, for the position of market research analyst. The position, however, does not appear to be primarily that of a business analyst/market research analyst. Therefore, the Service is not persuaded to classify the position as the specialty occupation of a market research analyst.

The first reason why the Service is not persuaded to classify the proffered position as a business analyst/market research analyst position concerns the particular duties of the proffered position compared with the duties of a typical market research analyst position. At page 148 of the Handbook, the DOL states that "[m]arket research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales." While the duties described by the petitioner appear to involve some sales analysis, the proffered position appears to be primarily that of a marketing manager or a market research manager as will be discussed further in this decision.

The second reason why the Service is not persuaded to classify the proffered position as a market research analyst position relates to the type of industry in which the beneficiary would be employed. Information in the Handbook, at page 149, provides insight into the types of industries in which market research analysts are normally found. According to the DOL:

Private industry provided about 4 out of 5 jobs for salaried workers, particularly economic and marketing research firms, managements consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

Although the list of private industry employers is not all inclusive, the DOL's description of a market research analyst's job implies that these types of positions are found within large firms or corporations, such as banks or worldwide pharmaceutical companies.

The record indicates that the petitioner, which is engaged in the travel industry, employs five persons and has a gross annual income of \$1.8 million. The travel industry is not within the DOL's list

of industries that typically require the services of a full-time individual who performs only market research analyst duties. For these reasons, the Service is not persuaded to label the offered position as a market research analyst position.

Although the Service does not agree with the petitioner that the position it is offering is a market research analyst position, the petitioner could, nevertheless, qualify the proffered position as a specialty occupation if the petitioner could establish that:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

See. 8 C.F.R. 214.2(h)(4)(iii)(A).

An analysis of the beneficiary's proposed duties reveals that the job being offered is the job of a marketing manager or a market research manager. According to DOL at page 25 of the Handbook:

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets . . . Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development.

The beneficiary's proposed job duties, which include selling travel related services, parallel the job responsibilities of a marketing

manager or market research manager. Information at page 25 of the Handbook does not indicate that either position requires a bachelor's degree in a specific field of study. Rather, most employers prefer a wide-range of educational backgrounds or promote individuals from within companies. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Additionally, the petitioner has not provided any evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position.

The petitioner submitted a position evaluation from Professor Giora Harpaz, Professor of Economics and Finance at The Zicklin School of Business Management, Baruch College, The City University of New York. Professor Harpaz states that the proffered position of "marketing analyst" is a specialty occupation because it requires bachelor's-level educational training in business administration, marketing, and related areas, and the application of specialized knowledge in these fields. However, Dr. Harpaz has not indicated how she arrived at this conclusion or cited the source materials upon which she relied to reach such conclusion. The record also contains a letter from S. K. Saghir, Marketing Manager of Air K Travel. Mr. Saghir states that the usual requirement for the position of market analyst in the travel industry is a baccalaureate degree in tourism or travel marketing. One letter, however, is insufficient evidence of an industry standard. In addition, the writer has not provided evidence in support of his assertion.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Counsel argues that this petition should be approved in view of the approval of other, purportedly similar petitions in the past. This Service is not required to approve applications or petitions where eligibility has not been demonstrated. The cases cited by counsel have no precedential effect in this proceeding. 8 C.F.R.103.3(c).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding for the position of a market research manager or marketing manager. Therefore, the director's decision is affirmed.

Beyond the decision of the director, the petitioner's labor condition application was certified on December 20, 1999, a date subsequent to December 3, 1999, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide

that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.

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